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No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER, PETITIONER

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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68 pp

QUESTIONS PRESENTED

1. Whether, in a case alleging the use of constitutionally unreasonable force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes the officer from being entitled to qualified immunity.

2. Whether the court of appeals erred in concluding that petitioner Saucier's use of force to detain respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside without injuring him, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 194 F.3d 962. The opinions of the district court (Pet. App. 17a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1999. A petition for rehearing was denied on January 10, 2000 (Pet. App. 65a-66a). On March 30, 2000, and May 1, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari, first to May 9, 2000, and then to June 8, 2000, and the petition was filed on the latter date. This Court granted the petition on November 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported

by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT

Respondent Elliot Katz, an animal rights activist,[1] brought this Fourth Amendment excessive force claim after he was detained at the Presidio military post in San Francisco.[2]

1. On September 24, 1994, Vice President Albert Gore and other speakers gave a special presentation at the Presidio to celebrate the conversion of that facility, which was then an Army base, into a national park the following week. Pet. App. 3a. The public was invited to attend. *Ibid.* Respondent arrived at the Presidio early on the day of the presentation, intending to display a banner protesting possible use of the Letterman Hospital in the Presidio for experimentation involving animals. *Id.* at 3a, 18a. The banner read: "Please Keep Animal Torture Out of Our National Parks." *Id.* at 4a, 19a. Perhaps aware that the Army prohibits the display of protest banners and other political activities at the Presidio and other military bases—respondent testified that he knew that visitors had been asked to leave the Presidio base for engaging in such activities, J.A. 29—respondent kept his banner concealed under his jacket as he entered and walked through the base, J.A. 19.[3]

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[1] The suit was also brought by respondent In Defense of Animals, an organization of which Dr. Katz is president. We use the word "respondent" to refer to respondent Katz alone, except where context indicates otherwise.

[2] The relevant facts are, for the most part, not disputed. Because the case arises on petitioner's motion for summary judgment, any disputed facts should be viewed in the light most favorable to respondent.

[3] Political activities (including political protest, campaigning, and leafleting) have long been prohibited on military bases. This Court has upheld that prohibition as "consistent with" the Nation's "constitutional

Respondent sat down in the front row of the seating area, near the speaker platform; at some point, he claims, he may have removed the banner from under his jacket and held it closed on his lap. J.A. 19, 21; Pet. App. 4a.

During Vice President Gore's speech, respondent moved forward from his seat to the waist-high barrier that separated the spectators from the Vice President and began to unfurl his roughly 4-foot-by-3-foot banner. Pet. App. 4a, 19a, 22a. Respondent placed the banner on the barrier—according to respondent, he "held the banner in place" on the barrier—and began allowing it to unfold. J.A. 23. As he did so, someone "grabbed [respondent] from behind, and somebody else tore the banner away." Pet. App. 4a, 24a. The two individuals were Sergeant Steven Parker and petitioner, then-Private now-Specialist Donald Saucier, who were serving as military police. *Id.* at 4a.[4] When the two saw respondent quickly move from his seat toward the barrier that separated the crowd from the Vice President—Parker testified that he saw respondent "rushing" or "running towards the barricade," J.A. 48, 50, and respondent's seat was only

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tradition of a politically neutral military," because it ensures that "official military activities" remain "wholly free of entanglement with partisan political campaigns," and because it insulates the military "from both the reality and the appearance of acting as a handmaiden for partisan political causes." *Greer* v. *Spock*, 424 U.S. 828, 839 (1976); *United States* v. *Albertini*, 472 U.S. 675, 684-686 (1985) (similar). In this case, Major Corbin Lee testified that the Army circulated fliers to potential protesters, including an animal rights group, explaining that visitors to the base would not be permitted to display banners, handbill, or otherwise protest on the base. J.A. 63-64. See also J.A. 65-66 (indicating that animal rights group had been given fliers and warned of the prohibition several times). Respondent denies receiving such written notification, Pet. App. 19a, but admits being aware of the fact that other visitors to the base had been asked to leave when they attempted to circulate handbills, J.A. 29.

[4] Because Sergeant Parker was never served with the complaint, he is not currently a party to this litigation. See Pet. App. 5a ("[A]t the time of this appeal Parker ha[s] not been served."); *id.* at 38a ("Defendant Parker had not been served and is not before this Court.").

about four feet from the barrier to begin with, J.A. 22-23—they immediately moved to intercept him. There is no allegation that Saucier or Parker hit or struck respondent. Instead, they each took one of respondent's arms and quickly removed him from the seating area. According to respondent, Saucier and Parker "started sort of picking me up and kind of walking me out, kind of like very hurriedly." Pet. App. 4a, 25a; J.A. 23-24. See also J.A. 24-25 (respondent's testimony that the officers "held [him] up in the air" so that his feet "were barely touching the ground" as they "mostly carried me walking out").

Respondent claims that the officers took him to a military police van located behind the seating area, and that he was "shoved" inside. Pet. App. 4a, 25a. Respondent also claims that, as a result of the shove, he fell inside the van and was almost injured. *Ibid.* But respondent was not injured. To the contrary, respondent caught himself and avoided injury. *Ibid.* See also J.A. 30. After being driven to a military police station, respondent was briefly detained. He was then released, and he returned to his car and drove himself home. Pet. App. 4a-5a.

The news media covered the events at the Presidio. As a result, portions of the above-described events were recorded and then broadcast on the local news. Videotapes of relevant portions of the broadcasts, which are part of the record in this case, were lodged with the Court together with the petition for a writ of certiorari.

2. Respondent brought this action against Specialist Saucier and other officials pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging (among other things[5]) that they violated his

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[5] Respondent also alleged a violation of his First Amendment rights, and claimed that the arrest violated his Fourth Amendment rights because the officers lacked probable cause to detain him. As we pointed out in the petition (at 4-5 & n.4), the district court rejected both of those claims, and neither of them is before this Court; only the claim that

Fourth Amendment rights by using constitutionally excessive force to arrest him. Pet. App. 23a-27a. Following discovery, Specialist Saucier sought summary judgment on qualified immunity grounds, arguing that a competent officer could reasonably have believed that the amount of force he used was consistent with the Fourth Amendment.

The district court denied the motion.[6] The court first addressed whether summary judgment was appropriate on the merits of the Fourth Amendment claim. The constitutionality of an officer's use of force, the district court explained, depends on whether the force was "'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." Pet. App. 24a (quoting *Graham* v. *Connor*, 490 U.S. 386, 388 (1989)). The objective reasonableness of force, the district court continued, depends on "the severity of the

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Saucier used unreasonable force is. With respect to the First Amendment claim, the district court concluded that, given "the transitional state of the Presidio on September 24, 1994"—the Presidio was still an Army post—it was not clear that the Presidio could be considered a public forum. Pet. App. 44a; *id.* at 5a. As a result, the court concluded that "the rights of protestors at the Presidio were not well established on the date in question, [and] a reasonable military officer could have concluded that preventing protests at the base was Constitutional." *Ibid.* For the same reason, the district court concluded that summary judgment was appropriate with respect to the claim of unlawful arrest. The court explained that, because a reasonable officer could have believed that prohibiting protests on the base was constitutional, a reasonable officer also could have believed that respondent was about to commit a crime when he approached the speaking area and attempted to unfurl a protest banner. *Id.* at 5a, 23a. Finally, the district court concluded that respondent lacked standing to seek declaratory and injunctive relief. *Id.* at 53a-64a. Respondent sought to appeal those rulings, but the court of appeals dismissed the appeal for lack of jurisdiction. *Katz* v. *United States*, No. 98-16121 (9th Cir. Sept. 21, 1998). Respondent has not sought this Court's review of that dismissal.

[6] Although respondent had also asserted excessive force claims against two supervisory officials, General Glynn C. Mallory and Major Corbin Lee, the district court granted their motions for summary judgment. Respondent, the district court concluded, had produced no evidence linking those defendants to the disputed use of force. Pet. App. 30a-34a.

crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Ibid.*

After reviewing the descriptions of the events offered by Specialist Saucier, Sergeant Parker, and respondent, Pet. App. 24a-27a, and the "videotape of television news coverage of the events at the Presidio conversion ceremony," *id.* at 27a, the district court concluded that there was some dispute as to the nature of the risk respondent presented to others and to the Vice President. *Ibid.* Although the officers had argued that it was permissible to seize respondent and quickly remove him from the crowd because of their "concern[] for the safety of the public and for the speakers," the court noted that, according to respondent, he had removed the banner from his jacket before approaching the barrier—making it less likely that he was pulling a weapon from his jacket as he approached—and that Saucier had been told in advance that respondent might be a protester. *Id.* at 26a. The court also relied on the fact that respondent is 60 years old; that he was wearing a leg brace because of a fractured foot; and that respondent "did not overpower the officers at any time." *Id.* at 27a. Describing the videotape evidence, the court stated:

> Viewed in a light most favorable to [respondent], the videotape shows two officers, on each side of [respondent], removing him from the crowd and carrying or pulling him toward the van. Once they arrive at the van, the officers push [respondent] into the van. Given the nature of the crime at issue and the circumstances surrounding the incident, the Court cannot conclude that the use of force was reasonable as a matter of law.

Ibid.

The district court also denied Specialist Saucier's motion for summary judgment on the issue of qualified immunity,

reasoning that the denial of summary judgment on the merits necessarily foreclosed the possibility of immunity. Pet. App. 27a-30a. Following a "two-prong" inquiry mandated by Ninth Circuit precedent, the district court first held that the law regarding the use of force was clearly established at the time the challenged conduct occurred. *Id.* at 28a-29a & n.1. Turning to the "next step" of the inquiry, the court examined whether "a reasonable officer could have believed that" Saucier "acted lawfully with regard to the degree of force used to remove [respondent] from the crowd and place him inside the van." *Id.* at 29a. In "the Fourth Amendment context," the district court held, "the qualified immunity inquiry is the same as the inquiry made on the merits. * * * The Court must consider whether the totality of the circumstances justified the particular type of seizure." *Id.* at 30a. In this case, the district court explained, it had already found disputed facts that precluded summary judgment on whether Saucier's use of force was reasonable. *Ibid.* It necessarily follows, the court declared, that Saucier is "not entitled to summary judgment on the basis of qualified immunity." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-16a. The court first rejected the government's contention that it was error to "equate[] the reasonableness test for the defense of qualified immunity with the reasonableness test for the merits of an excessive force claim." *Id.* at 8a. Like the district court, the court of appeals explained that, in the Ninth Circuit, the qualified immunity inquiry has two prongs. The first asks whether the legal standard or formula governing the officer's conduct is clearly established. The second asks whether a reasonable officer, applying that standard, could have believed his conduct was lawful. *Ibid.* In excessive force cases, the court stated, the Fourth Amendment reasonableness test and the second prong of the qualified immunity analysis both focus "on the objective reasonableness of the officer's conduct." *Id.* at 10a. "Because of this parity,"

the court concluded, "we have repeatedly held that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Ibid.* (internal quotation marks omitted). The court of appeals rejected the government's contention that equating the qualified immunity inquiry and the Fourth Amendment reasonableness test is inconsistent with the Ninth Circuit's earlier en banc decision in *Hammer* v. *Gross*, 932 F.2d 842, 850, cert. denied, 502 U.S. 980 (1991), and this Court's decision in *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987). Pet. App. 12a-14a. In *Anderson*, this Court rejected the argument that an officer who conducts an unreasonable *search* in violation of the Fourth Amendment cannot, by definition, have behaved reasonably so as to be entitled to qualified immunity. 483 U.S. at 643. In *Hammer*, the Ninth Circuit relied on *Anderson* to reject the argument that "an officer who has used unreasonable *force* cannot, by definition, have acted reasonably" so as to be entitled to qualified immunity. *Hammer*, 932 F.2d at 850 (emphasis added). Noting that *Anderson* v. *Creighton* itself had rejected a "similar contention" in the context of searches, the *Hammer* court explained:

> Whether a search is "unreasonable" within the meaning of the Fourth Amendment is an entirely different question from whether an officer reasonably could have believed his actions lawful under the Fourth Amendment. *Anderson*, 483 U.S. at 643-44 * * *. To accept Hammer's contention would be to eliminate all possibility of immunity for violations of the Fourth Amendment, an unacceptable outcome.

Ibid.

The court of appeals in this case attempted to distinguish the en banc decision in *Hammer* as having been resolved under the first prong of the Ninth Circuit's two-prong

approach. Pet. App. 13a. In *Hammer*, the court of appeals stated, the governing legal standard had changed over time and thus was not "clearly established." According to the court of appeals, this Court had "articulated a new objective reasonableness test that was different" from the "'shock-the-conscience' test" in effect at the time the defendant in *Hammer* had acted. *Ibid.* (citing *Graham*, 490 U.S. at 386). Because a reasonable officer "could have believed that [the defendant's] conduct did not 'shock the conscience' and thus was in fact lawful under the legal test used at the time," the court stated, the defendant in *Hammer* could be entitled to qualified immunity even though the "amount of force used * * * violated the Fourth Amendment because it was objectively unreasonable." *Ibid.* "A defendant," the court of appeals concluded, "will always be entitled to qualified immunity when the law governing his or her conduct was not clearly established—the first prong of the qualified immunity defense." *Id.* at 14a.

In a footnote, the court of appeals attempted to distinguish this Court's decision in *Anderson* v. *Creighton*. Pet. App. 14a n.4. *Anderson*, the court of appeals stated, primarily "focuses on the proper formulation of the 'clearly established'" or "first prong" of the qualified immunity inquiry. *Ibid.* *Anderson* does not, the court of appeals continued, "address the application of the second prong of the qualified immunity analysis" (*i.e.*, whether a reasonable officer could have believed the relevant conduct to be lawful), "let alone its application in excessive force cases." *Ibid.*

Having concluded that the qualified immunity inquiry does not differ from the test of reasonableness under the Fourth Amendment itself, the Ninth Circuit then turned to whether "the amount of force [Specialist Saucier] used in arresting [respondent] was so minimal that it was *per se* reasonable." Pet. App. 14a-15a. "The question of the reasonableness of force," the court of appeals stated, "is usually a question of fact for the jury," and summary judgment

therefore is appropriate only "when, viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable." *Id.* at 15a n.5 (internal quotation marks omitted). In this case, the court of appeals concluded, the force used was not so minimal as to compel a finding of reasonableness.

The court noted that, according to respondent, Saucier and Parker had seized him from behind "without warning or speaking to him," half-carried, half-walked him for about fifty feet, and forcefully pushed him inside the van. Pet. App. 15a. On the whole, the court appeared to conclude, that constituted a disproportionate response. "Unfurling a banner," the court of appeals stated, is not a severe crime; respondent was a sixty-year-old man wearing a leg brace; "[t]here is no indication that he was armed or dangerous"; and, "[f]rom all that appears at this stage of the case," respondent "did not pose an immediate threat to the safety of the officers or anyone else." *Ibid.* The court therefore concluded that summary judgment was properly denied on the merits of the Fourth Amendment claim, and thus on the issue of qualified immunity as well. *Ibid.*

The court of appeals denied rehearing en banc. Pet. App. 65a-66a. On November 13, 2000, this Court granted the petition for a writ of certiorari. 121 S. Ct. 480.

SUMMARY OF ARGUMENT

I. A. Qualified immunity precludes a government official from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), this Court clarified the level of generality at which the qualified immunity inquiry must take place. Immunity, the Court held, may not be denied merely because "the relevant 'legal rule'" was "clearly established" at a higher level of generality. *Id.* at

639. Instead, the Court held, immunity may be denied only if "the right the official is alleged to have violated [was] 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what *he is doing* violates that right." *Id.* at 640 (emphasis added). The Court also rejected the contention that the defense of qualified immunity is necessarily foreclosed in Fourth Amendment cases whenever an unreasonable search has occurred. *Id.* at 643.

Anderson v. *Creighton* controls this case. Like the determination of whether a search is reasonable, the determination of whether a particular use of force is reasonable "is not capable of precise definition or mechanical application," and depends on "a careful balancing of the nature and quality of the intrusion * * * against the countervailing governmental interests at stake." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted). The test of "objective reasonableness" this Court articulated in *Graham* is by necessity general and does not, for every set of circumstances an officer might encounter, clearly resolve whether a particular use of force will be held to be reasonable. Consequently, even if an officer uses objectively unreasonable force and violates the Fourth Amendment, he cannot be held liable in damages for that conduct unless the illegality of his conduct was sufficiently "obvious" in advance "that no reasonably competent officer would have concluded" that the actions were constitutional. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Thus, a Fourth Amendment violation occurs when, even taking due account of the split-second nature of an officer's decision, the conduct turns out to have been, on balance, objectively unreasonable. But immunity is nonetheless appropriate unless that conduct was sufficiently beyond the sometimes "hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution," *i.e.*, unless governing case law or the "applica-

tion of the [excessive force] standard would inevitably lead every reasonable officer in [the Defendants'] position to conclude the force was unlawful." *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000); *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559 (1993), amended, 14 F.3d 583 (11th Cir. 1994).

Notwithstanding *Anderson*, the Ninth Circuit in this case held that, in the context of unreasonable force claims, the question of Fourth Amendment reasonableness is the same as the qualified immunity inquiry, and that an officer therefore cannot be entitled to qualified immunity if he used constitutionally unreasonable force. The court of appeals reasoned that force cannot be "objectively reasonable" for purposes of the qualified immunity inquiry, while also being "objectively unreasonable" for purposes of the Fourth Amendment itself. See, *e.g.*, Pet. App. 10a. This Court, however, rejected precisely that reasoning as "unpersuasive" in *Anderson*. The fact that a particular search or seizure turns out to have been unreasonable, the Court explained, does not necessarily resolve whether its illegality was sufficiently obvious in light of pre-existing law that no reasonable officer could have thought it to be reasonable. As a result, the Court held, qualified immunity is no less available to officers who reasonably err in determining the boundaries of lawful conduct under the Fourth Amendment than to those who make similar errors in other areas of law. 483 U.S. at 643.

The Ninth Circuit's rationale also obscures a critical difference between the functions served by the reasonableness inquiry in the Fourth Amendment and in the qualified immunity test. Although both use the term "reasonable" (or its converse, "unreasonable"), they employ that term for different purposes and in different senses. When a decisionmaker determines whether constitutionally unreasonable force has been used in violation of the Fourth Amendment, it articulates a standard to govern the conduct of an officer confronting a certain set of facts, *i.e.*, it decides whether the

officer's *conduct* was "objectively reasonable" for purposes of the Fourth Amendment. *Graham*, 490 U.S. at 397. But when a decisionmaker resolves the question of immunity, it asks a different question—whether that standard of conduct was sufficiently *obvious* in the first instance that it would be unreasonable to have reached the opposite conclusion. Thus, under the Fourth Amendment, reasonableness defines the boundaries of lawful conduct; in the qualified immunity context, it defines the often wider boundaries of what an officer might *reasonably have believed* to be lawful at the time he acted.

B. Seeking to reconcile its decision with *Anderson*, the Ninth Circuit suggested (in a footnote) that *Anderson* turned on the fact that the general legal rule to be applied when judging the official conduct there, unlike the test applicable here, was uncertain. That contention, however, cannot be reconciled with *Anderson*. The decision and question presented in *Anderson* were premised on the fact that the general legal rule governing the warrantless search at issue there was well settled; the question was whether officers could nonetheless be entitled to qualified immunity because it was not clearly established that, under that well-settled rule, the officers' conduct was illegal on the facts they confronted. Answering that question in the affirmative, this Court held it was error to deny qualified immunity merely because the general legal rule or standard was well settled. Instead, the Court held, qualified immunity may be denied only if no competent officer, in light of pre-existing law and the specific facts the defendant confronted, could reasonably have concluded that the search in question was lawful. 483 U.S. at 639-641. Similar analysis applies here.

C. The Ninth Circuit's decision also prevents qualified immunity from serving as an immunity to suit, because it effectively requires all excessive force cases to be resolved at trial. According to the court of appeals, the reasonableness of any use of force is usually "a question of fact" for

the jury, and qualified immunity must be denied at summary judgment unless "the evidence *compels* the conclusion that [the officer's] use of force was reasonable." Pet. App. 15a n.5 (emphasis added). That, however, turns the inquiry on its head. Qualified immunity is not appropriate merely where, viewing the facts in the light most favorable to the plaintiff, the force employed was reasonable as a matter of law. Instead, it is also appropriate where, under the plaintiff's version of the events, reasonable officers could disagree on whether or not the force was reasonable.

II. The decision below illustrates the danger of equating the qualified immunity and the reasonable force inquiries.

A. In this case, Specialist Saucier used minimal force to remove respondent from the crowd. The court of appeals held that such conduct was unreasonable because, among other things, Saucier should have spoken to respondent before removing him. But Saucier's decision to act decisively —and use surprise to his advantage—to gain control over an individual who was flagrantly violating the law was not unreasonable given the circumstances and the uncertainty Saucier confronted. In any event, Saucier's conduct was not sufficiently beyond the bounds of potentially lawful behavior under the Fourth Amendment that, in light of pre-existing law, every reasonable officer would necessarily have understood it to be unlawful.

B. The court of appeals also concluded that Specialist Saucier was not entitled to qualified immunity with respect to the amount of force used to move respondent into the van. But "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers * * * violates the Fourth Amendment." *Graham*, 490 U.S. at 396 (internal quotation marks omitted). Besides, it is undisputed that the allegedly forceful push of which respondent complains did not come from Saucier—it came from Sergeant Parker—and the court of appeals has articulated no theory under which Saucier may be held legally responsible for it.

Because reasonable officers certainly could have believed that the amount of force *Saucier* used to place respondent into the van was lawful, Saucier is entitled to qualified immunity.

ARGUMENT

I. AN OFFICER WHO USES FORCE THAT IS ULTIMATELY FOUND UNREASONABLE UNDER THE FOURTH AMENDMENT MAY NEVERTHELESS BE ENTITLED TO QUALIFIED IMMUNITY

A. The Qualified Immunity Inquiry Is Distinct From The Substantive Fourth Amendment Excessive Force Inquiry Because Of The Different Purposes Served By The Two Inquiries

In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that qualified immunity precludes a government official from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." The qualified immunity inquiry is objective, and immunity may not be denied merely because, in the end, the officer's conduct was unlawful. Instead, even where an officer errs and violates the Constitution, immunity shields the officer from liability and suit unless, "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions at issue were constitutional at the time they were undertaken. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). "[I]f officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized." *Ibid.*

Official immunity is rooted in the policy consideration that the "public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974). "Implicit in the idea that officials have some immunity—absolute or qualified—for their acts,

is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.* at 242. Qualified immunity thus serves to ensure that officials do not "exercise their discretion with undue timidity." *Wood* v. *Strickland*, 420 U.S. 308, 321 (1975). Consistent with that goal, it provides "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley*, 475 U.S. at 343, 341).

1. After this Court decided *Harlow* in 1982, federal courts routinely recognized the appropriateness of immunity in cases in which an official was alleged to have violated a bright-line rule, where that rule was not recognized by the courts until after the official's conduct took place. For example, in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), this Court held that federal officers were entitled to qualified immunity for conducting warrantless wiretaps because, at the time the officers acted, it was not clearly established that the warrant clause extended to such interceptions. Until this Court decided *Anderson* v. *Creighton*, 483 U.S. 635 (1987), however, federal courts had greater difficulty deciding whether qualified immunity was available in cases where the general legal standard or rule was well defined at the time the officials acted, but the standard—because it did not establish a bright line—would not necessarily have put reasonable officials on notice that their conduct violated the plaintiff's rights. For example, the principle that "probable cause" is necessary to justify a Fourth Amendment search is well settled, but that principle by itself would not necessarily enable a reasonable law enforcement officer to ascertain whether a particular search is permissible under the circumstances confronting him. The question thus was whether an official could be entitled to qualified immunity where the governing legal standard or formula was well recognized, but

it was not clearly established that the official's conduct under the circumstances, judged according to the settled standard or formula, was unlawful.

In *Anderson* v. *Creighton*, 483 U.S. at 639, this Court resolved that question. In *Anderson*, the court of appeals held that qualified immunity was unavailable to an officer who allegedly conducted a warrantless search of a home, because the legal rule governing such searches—that they are unconstitutional "unless the searching officers have probable cause and there are exigent circumstances—was clearly established" at the time the officer acted. *Id.* at 640. The court of appeals "specifically refused" to address whether the result of *applying* that rule to the facts confronting the officer would have made it clear to every reasonable officer that the search was unlawful. *Id.* at 640-641.

This Court reversed. Addressing the issue of qualified immunity generally, the Court first held that immunity may not be denied merely because "the relevant 'legal rule'" was "clearly established" at a higher level of generality, *e.g.*, immunity cannot be denied in a due process case simply because "the right to due process of law is quite clearly established by the Due Process Clause." 483 U.S. at 639. Instead, the Court held, immunity may be denied only if "the right the official is alleged to have violated [was] 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Id.* at 640 (emphasis added). The Court continued: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful * * * but it is to say that in the light of pre-existing law the unlawfulness" of the conduct "must be apparent." *Ibid.*

Turning to the case before it, the Court held that the court of appeals had erred by denying the officer's claim of qualified immunity merely because the relevant legal test—

as opposed to the result of applying that test to the facts confronting the officer—had been clearly established. *Anderson*, 483 U.S. at 640-641 (court of appeals' failure "to consider" the defendant's "argument that it was *not* clearly established that the circumstances with which [he] was confronted did not constitute probable cause and exigent circumstances" was "erroneous"). Instead, the Court explained, the court of appeals should have examined the "fact-specific" question of whether, "in light of * * * the information the searching officers possessed," a "reasonable officer could have believed [the] warrantless search to be lawful." *Id.* at 641. So long as reasonable officers could disagree on the lawfulness of the search under the particular facts and circumstances of that case, the Court explained, the defendants must be accorded qualified immunity. *Ibid.* See also *id.* at 638 ("Our cases * * * generally provid[e] government officials * * * with a qualified immunity * * * as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.").

In *Anderson*, this Court also declined to establish an exception to the qualified immunity doctrine for Fourth Amendment claims. 483 U.S. at 643-646. The *Anderson* plaintiffs had argued that, because both the Fourth Amendment and the qualified immunity test articulated in *Harlow* turn on objective reasonableness, there is no reason to conduct a qualified immunity inquiry in Fourth Amendment cases. *Id.* at 643. This Court rejected that argument. The Court explained that it had previously applied qualified immunity in Fourth Amendment cases. *Ibid.* Moreover, the Court observed, the plaintiffs' argument was logically flawed, because it rested on the coincidence of the word "reasonable" in the qualified immunity test of *Harlow* and the substantive command of the Fourth Amendment. *Ibid.* Although the word appears in both contexts, it serves different purposes and has different meanings in each. In

the Fourth Amendment, it defines the boundary of lawful police conduct; but in qualified immunity, it defines the somewhat broader zone of conduct an officer might have, based on pre-existing law, reasonably believed to be lawful. Where a law enforcement officer makes a reasonable although mistaken judgment regarding the lawfulness of a search under the Fourth Amendment, the Court held, he should "no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.* at 643-644. See also 1 Wayne R. LaFave, *Search and Seizure* § 1.10(b), at 328 (3d ed. 1996) ("[T]he *Anderson* majority rejected" the contention "that a violation of the Fourth Amendment, being an 'unreasonable' search or seizure, could never be reasonable under *Harlow*.").

Anderson makes it clear that, as in other types of cases, the question of qualified immunity in Fourth Amendment cases is distinct from whether there has been a constitutional violation at all. To decide the constitutional question, the decisionmaker applies its best understanding of current law to determine whether, at bottom, the search or seizure was "unreasonable" within the meaning of the Fourth Amendment. See U.S. Const. Amend. IV; *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.'") (quoting *Florida* v. *Jimeno*, 500 U.S. 248, 250 (1991)). The Fourth Amendment reasonableness determination establishes the boundaries of lawful conduct; it represents an assessment of the official action that society is willing to tolerate as constitutionally acceptable. In contrast, the question for qualified immunity purposes is not Fourth Amendment reasonableness or the legality of the officer's conduct *vel non*. It is instead whether the officer should be spared the burden of litigation and potential monetary liability because—given uncertainty in either the legal standard or its application to the circumstances confronting the officer at the time he acted—an appropriately competent officer could *reasonably*

have believed that the search or seizure was reasonable within the meaning of the Fourth Amendment, even if such a belief would be erroneous. The qualified immunity determination thus does not represent a judgment regarding the conduct society is prepared to recognize as constitutionally permissible. Rather, it represents a judgment that, although the conduct is unconstitutional, the officer should not be held personally liable because the law did not make the illegality of his conduct "obvious" or "apparent" at the time he acted. See *Hunter*, 502 U.S. at 227 ("qualified immunity shields agents * * * if 'a reasonable officer could have believed [the seizure] to be lawful, in light of clearly established law and the information the arresting officers possessed.'"); *Anderson*, 483 U.S. at 641 (officers should be immune where they "reasonably but mistakenly conclude" that the search was lawful). As the Court explained in *Harlow*, an officer is entitled to immunity unless any reasonably competent official would "fairly be said to 'know' that the law forbade [the] conduct" in question. 457 U.S. at 818.

This Court repeatedly has recognized that distinction in Fourth Amendment search and seizure cases alike. Thus, in *Anderson* v. *Creighton*, the Court emphasized that, even if the search at issue there was unreasonable for Fourth Amendment purposes, the officer is entitled to immunity unless the unreasonableness of that search, under the circumstances the officer confronted, was sufficiently clear that "a reasonable official would understand that *what he is doing* violates" the Fourth Amendment, *i.e.*, the unreasonableness of the conduct "in the light of pre-existing law * * * must be *apparent*." *Anderson*, 483 U.S. at 640 (emphases added). And in *Malley* v. *Briggs* and *Hunter* v. *Bryant*, the Court explained that, even if the seizures (arrests) at issue in those cases were unreasonable, immunity may be denied only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that they were lawful, *Malley*, 475 U.S. at 341; qualified immunity, those decisions

further emphasized, must provide "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter*, 502 U.S. at 229 (quoting *Malley*, 475 U.S. at 343, 341).

2. Notwithstanding this Court's decisions in *Anderson*, *Malley*, and *Hunter*, the Ninth Circuit in this case held that, for one particular type of Fourth Amendment claim—one challenging the reasonableness of a seizure based on the force used to effectuate it—a finding of unconstitutionality necessarily precludes a finding of qualified immunity, because "the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." Pet. App. 10a (quoting *Alexander* v. *County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995)). The Ninth Circuit reached that conclusion based on the fact that both inquiries are framed in terms of "objective reasonableness." It is not possible, the Ninth Circuit reasoned, for the force to be "objectively reasonable" for purposes of the qualified immunity inquiry, while also being objectively unreasonable for purposes of the Fourth Amendment itself. See, *e.g.*, Pet. App. 10a (finding "parity" because both immunity "and the merits of an excessive force claim focus on the objective reasonableness of the officer's conduct"); *Street* v. *Parham*, 929 F.2d 537, 540, 541 n.2 (10th Cir. 1991) (once factfinder determines that "the force used was unnecessary under the circumstances, any question of objective reasonableness" for immunity purposes "has also been foreclosed" because "[n]o officer could reasonably believe that the use of unreasonable force did not violate clearly established law").

This Court, however, rejected precisely that reasoning in *Anderson*. In *Anderson*, the plaintiffs—like the court of appeals here—contended that the test for qualified immunity merely duplicates the Fourth Amendment merits inquiry because both require objective reasonableness; it "is not

possible," the *Anderson* plaintiffs argued, "to say that one 'reasonably' acted unreasonably." 483 U.S. at 643. This Court rejected the argument as "unpersuasive," *ibid.*, because it relies on a coincidence of language—the common use of the word "reasonable"—in the Fourth Amendment and the qualified immunity test articulated in *Harlow*. If the Fourth Amendment had been written to speak of "undue" searches and seizures, the Court explained, the fallacy of the argument would be apparent, even though the meaning of the Amendment would be unchanged:

> [The argument's] surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of "unreasonable" searches and seizures. Had an equally serviceable term, such as "undue" searches and seizures been employed, what might be termed the "reasonably unreasonable" argument against application of *Harlow* to the Fourth Amendment would not be available—just as it *would* be available against application of *Harlow* to the Fifth Amendment if the term "reasonable process of law" had been employed there. The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable * * *. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable [although ultimately mistaken] should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id. at 643-644.

The same analysis forecloses the Ninth Circuit's reasoning here. See *Oliveira* v. *Mayer*, 23 F.3d 642, 648 (2d Cir. 1994) (*Anderson* "authoritatively instructed that the objective reasonableness component of the inquiry as to lawfulness is not the same as the objective reasonableness component of the

inquiry as to qualified immunity"), cert. denied, 513 U.S. 1076 (1995); *Karnes* v. *Skrutski*, 62 F.3d 485, 491-492 n.3 (3d Cir. 1995) (the attempt to equate the two inquiries "misconstrues the nature of qualified immunity, and in any case has been rejected by the Supreme Court").[7] In *Graham* v. *Connor*, 490 U.S. 386, 397 (1988), this Court held that the legality of any use of force under the Fourth Amendment depends on "whether the officers' actions are 'objectively unreasonable' in light of the circumstances confronting them." See also *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985) (question is "whether the totality of the circumstances justifie[s] a particular sort of * * * seizure"). Expanding on that analysis, the Court identified several relevant factors, such as the severity of the crime, potential threats to officer safety, and whether the suspect resists arrest or attempts to flee. 490 U.S. at 396. And it emphasized that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20

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[7] Indeed, the Ninth Circuit's decision essentially resurrects the reasoning lower federal courts employed to bar qualified immunity in Fourth Amendment probable cause cases before *Anderson*—and which *Anderson* squarely rejects. Before *Anderson*, some courts of appeals had taken the position that, where an officer conducts a search or arrest without probable cause, he could not defend by arguing that he reasonably engaged in unreasonable conduct. See *Deary* v. *Three Un-Named Police Officers*, 746 F.2d 185, 192-193 (3d Cir. 1984); *Clark* v. *Beville*, 730 F.2d 739, 740-741 (11th Cir. 1984). See also Jon O. Newman, *Suing the Lawbreakers*, 87 Yale L.J. 447, 460 (1978) ("[I]f the plaintiff's own case requires him to show an arrest that was not reasonably based on probable cause, what does the [immunity] defense mean? Surely the officer could not *reasonably* believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe that there was probable cause."). *Anderson* ended that line of cases, holding unequivocally that a law enforcement officer could act in an objectively reasonable fashion even though he or she had violated the Fourth Amendment's bar on unreasonable searches or seizures. See *Oliveira*, 23 F.3d at 648 (Newman, J.) (conceding that *Anderson* "authoritatively instruct[s]" that the reasoning is mistaken).

vision of hindsight." *Ibid.* The "calculus of reasonableness" the Court observed, "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-397.

Ultimately, however, the Court concluded that the reasonable force test, like reasonableness under the Fourth Amendment generally, "is not capable of precise definition or mechanical application," and depends on "a careful balancing of the nature and quality of the intrusion * * * against the countervailing governmental interests at stake." 490 U.S. at 396 (internal quotation marks omitted). Consequently, like the standard of probable cause, neither the standard of "objective reasonableness" nor the non-exclusive list of factors identified in *Graham* necessarily establishes with clarity whether any particular quantity or form of force, under the specific circumstances confronting an officer, will be considered unlawful. To the contrary, reasonable judges applying *Graham* often disagree over whether the force employed under particular circumstances is constitutionally reasonable,[8] and so too can reasonable officers. See *Wilson*

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[8] Compare *Colston* v. *Barnhart*, 130 F.3d 96 (5th Cir. 1997) (use of deadly force objectively reasonable), cert. denied, 525 U.S. 1054 (1998), with *id.* at 103 (DeMoss, J., dissenting) (stating that officer's "failure to give a warning, which he was obliged to give, if feasible, before the use of deadly force" indicates that force may have been unreasonable); *Sharrar* v. *Felsing*, 128 F.3d 810, 820-822 (3d Cir. 1997) (finding use of force reasonable), with *id.* at 832-833 (Pollak, J., dissenting) (arguing that holding a deadly weapon to head of unarmed suspects may have, given the circumstances, violated the Fourth Amendment); *Joos* v. *Ratliff*, 97 F.3d 1125, 1126 (8th Cir. 1996) (finding use of force reasonable), with *id.* at 1126-1127 (M. Arnold, J., dissenting) ("I cannot say that the force applied to Mr. Joos was reasonable."); *In re City of Philadelphia Litig.*, 49 F.3d 945, 965-970 (3d Cir. 1994) (Greenberg, J.) (finding decision to use incendiary device reasonable under the Fourth Amendment), with *id.* at 974 (Scirica, J., concurring and dissenting) ("I do not believe that we can say, as a matter of law, that no reasonable jury could conclude that the decision to use the

v. *Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). Consequently, "if officers of reasonable competence could disagree on" the lawfulness of the seizure, "immunity should be recognized." *Malley*, 457 U.S. at 341. Indeed, this Court's decision in *Graham* suggests that very result, observing that "the officer's *objective* 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983." 490 U.S. at 399 n.12 (citing *Anderson*).[9]

Here, as in *Anderson*, the contention that the qualified immunity test and the Fourth Amendment's requirements converge rests on the fact that the Fourth Amendment's guarantee has been expressed in terms of reasonableness. And here, as in *Anderson*, the "precise content of" the Fourth Amendment's "civil-liberties guarantees" in any situation "rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable." See *Graham*, 490 U.S. at 396 (determination of whether the force "used to effect a particular seizure" is constitutional "requires a careful balancing of the nature and quality of the intrusion * * * against the countervailing government in-

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incendiary device was an excessive use of force."); *Forrester* v. *City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994) ("ample evidence supports the jury's conclusion that the officers acted reasonably"), cert. denied, 513 U.S. 1152 (1995), with *id.* at 810 (Kleinfeld, J., dissenting) ("As I apply the *Graham* factors one by one, I cannot see how the force used in this case could be reasonable.").

[9] The Court also stated that "[s]ince no claim of qualified immunity has been raised in this case, * * * we express no view on its *proper application* in excessive force cases." 490 U.S. at 399 n.12 (emphasis added). That sentence on its face reserves the question *how* qualified immunity applies in excessive force cases, and not, as the court of appeals mistakenly believed, Pet. App. 14a n.4, *whether* it applies.

terests at stake"). Consequently, here, as in *Anderson*, "[l]aw enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law."

As this Court observed in a different context, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams* v. *Taylor*, 120 S. Ct. 1495, 1522 (2000).[10] Just as a court may apply federal law in a manner that is incorrect but not unreasonable, so too an officer may, in applying *Graham* to particular circumstances, reach a conclusion that is incorrect but not unreasonable. So long as it would be a legally reasonable (if erroneous) application of Fourth Amendment standards for an officer to conclude that his conduct conforms to the Fourth Amendment's requirements—*i.e.*, so long as the conduct is sufficiently close to an unclear constitutional boundary that officers of appropriate competence could disagree on its legality—the officer is entitled to qualified immunity. It is only where an officer's belief in the lawfulness of the conduct under *Graham* would be *unreasonable*, rather than being merely *mistaken*, that immunity may be denied.

3. The Ninth Circuit's rationale obscures a critical difference between the functions the "objective reasonableness"

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[10] *Williams* construed the federal habeas corpus statute, 28 U.S.C. 2254(d)(1), which may contain a less forgiving test of reasonableness than that applicable in the qualified immunity context; Section 2254(d)(1) looks to whether a decision constitutes a reasonable *judicial* application of established law, while qualified immunity examines whether an appropriately competent *officer* reasonably could have thought the conduct lawful. See 120 S. Ct. 1506 n.12 (opinion of Stevens, J.) (Congress did not intend to draw the concept of "clearly established law" in Section 2254(d)(1) from "the doctrinally distinct law of qualified immunity," although the principle may be a "conceptual twin"). It nonetheless remains true that, in the qualified immunity and habeas contexts alike, an erroneous application of a constitutional test is different from an unreasonable one.

inquiry serves in the Fourth Amendment and in qualified immunity. As explained above, when a jury or a court determines whether constitutionally unreasonable force has been used in violation of the Fourth Amendment, it articulates a standard to govern the conduct of an officer confronting a certain set of facts, *i.e.*, it decides whether the officer's *conduct* was "objectively reasonable" for purposes of the Fourth Amendment. *Graham*, 490 U.S. at 397. But when a decision-maker resolves the question of immunity, it asks a different question—whether that standard of conduct was sufficiently *obvious* in the first instance that it would be objectively unreasonable for an officer to have reached the opposite conclusion. Although both inquiries use the term "reasonable" (or its converse, "unreasonable"), they employ that term for different purposes and in different senses. With respect to the Fourth Amendment itself, reasonableness defines the boundaries of lawful conduct. In the immunity context, it defines the often wider boundaries of what an officer—because of a lack of clarity either in the legal standard or in its application to the specific facts of the case—might *reasonably have believed* to be lawful at the time he acted.

Consequently, the determination that an officer's use of force was "unreasonable" for Fourth Amendment purposes does not, as a matter of logic, necessarily preclude a determination that the question was sufficiently close that reasonable officers (or reasonable judges or jurors) could have disagreed about that conclusion in advance. As the Second Circuit has explained, "to say that the use of constitutionally excessive force violates a clearly established right * * * begs the open question whether the particular degree of force under the particular circumstances was" so clearly "excessive" that no reasonably competent officer could have thought it lawful. *Finnegan* v. *Fountain*, 915 F.2d 817, 823 (2d Cir. 1990). In other words, a Fourth Amendment violation occurs when, even taking due account of the split-second nature of an officer's decision, the conduct turns out to have

been, on balance, objectively unreasonable. But immunity is nonetheless appropriate unless that conduct was sufficiently "beyond" the sometimes "hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution," *i.e.*, unless pre-existing case law or the "application of the [excessive force] standard would inevitably lead every reasonable officer in [the Defendants'] position to conclude the force was unlawful." *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000); *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559 (1993), amended, 14 F.3d 583 (11th Cir. 1994).[11] Precisely that

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[11] Although findings of excessive force and qualified immunity are not necessarily inconsistent, they are not necessarily consistent either. In some cases, there will be no set of facts supported by the evidence under which the officer's conduct could both be unconstitutional and sufficiently close to an unclear constitutional boundary to warrant immunity. That may sometimes be true in cases involving the application of bright-line rules—such as the rule concerning the use of deadly force announced in *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985)—where the parties present two different, and mutually exclusive, versions of the facts. For example, if the plaintiff argues that the officer shot him while he was handcuffed and compliant, but the officer claims the plaintiff was loose and threatening him and others with a deadly weapon, one would not expect a jury accepting one of those two stories to reach different conclusions regarding Fourth Amendment reasonableness and qualified immunity. Under the plaintiff's version of the facts, the officer's conduct is unreasonable, and so obviously unreasonable that immunity could not be granted; under the officer's, in contrast, the conduct should be considered reasonable as a matter of law. Great caution in this area, however, is warranted. Juries are not restricted to accepting one party's or the other's view of the facts, and they often conclude that the truth lies somewhere in between. Moreover, even supposedly bright-line rules do not necessarily yield undebatably certain legal results when applied to specific facts. Thus, *Tennessee* v. *Garner* holds that officers may not use deadly force to apprehend a fleeing felon unless the officer "has probable cause to believe that the felon poses a threat of serious physical harm, either to the officer or to others." 471 U.S. at 11. Notwithstanding the bright-line nature of that rule, an officer could be entitled to immunity even though his conduct was unconstitutional. For example, an officer might be entitled to qualified immunity because it had not been clearly established, at the time he acted, that the particular form of force he employed should be considered "deadly" under

conclusion has been reached at various times by court of appeals after court of appeals, including the First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits.[12] As

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Garner; or because the officer reasonably (but mistakenly) concluded that the facts were sufficient to establish probable cause to believe that the suspect was armed and dangerous.

[12] *Napier* v. *Town of Windham*, 187 F.3d 177, 188 (1st Cir. 1999) (because officer "*could have reasonably believed*" that the force "was justified and lawful," he was, "under the standard enunciated in *Anderson*, * * * entitled to qualified immunity * * *, whether [there was] a viable Fourth Amendment violation or not"); *Finnegan*, 915 F.2d at 823 (immunity proper unless it "should have been apparent" that the "particular degree of force under the particular circumstances was excessive"); *Lennon* v. *Miller*, 66 F.3d 416, 425 (2d Cir. 1995) (immunity appropriate where facts would not support the conclusion "that the force used was so excessive that no reasonable officer would have made the same choice"); *Rowland* v. *Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (immunity question is "whether a reasonable officer could have believed that the use of force alleged was objectively reasonable"); *Brown* v. *Glossip*, 878 F.2d 871, 873 (5th Cir. 1989) ("We can discern no principled distinction between the availability of qualified immunity as a defense to unreasonable searches * * * under the fourth amendment and as a defense to an excessive force claim also grounded in the fourth amendment."); *Ellis* v. *Wynalda*, 999 F.2d 243, 246 n.2 (7th Cir. 1993) ("the doctrine of qualified immunity still serves an important purpose in cases of alleged excessive force"); *Jones* v. *Webb*, 45 F.3d 178, 184 (7th Cir. 1995) (summary judgment proper where "a reasonable police officer certainly could have believed that the limited force applied * * * was not unconstitutionally excessive in light of clearly established law"); *Landrum* v. *Moats*, 576 F.2d 1320, 1327-1328 (8th Cir.) ("The defense of good faith is not * * * inapplicable to an action based on excessive force."), cert. denied, 439 U.S. 912 (1978); *McGruder* v. *Heagwood*, 197 F.3d 918, 920 (8th Cir. 1999) ("objectively reasonable police officers could have believed that they were not using excessive force, though this belief may have been erroneous"); *Gold* v. *City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997) (officer entitled to immunity "unless application of the [excessive force] standard would inevitably lead a reasonable officer in the defendant's position to conclude that the force was unlawful") (internal quotation marks omitted), cert. denied, 525 U.S. 870 (1998). See also *Sledd* v. *Lindsay*, 102 F.3d 282, 287 (7th Cir. 1996) (plaintiff may defeat qualified immunity by "show[ing] that the force was *so excessive* that, as an objective matter, the police officers would have been *on notice that they were violating* the Fourth Amendment") (emphases added)). We note that, at other times, two of those courts have

Justice Powell observed while sitting by designation on the Fourth Circuit, "[t]here is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim, when it is allowed in other actions alleging violations of the Fourth Amendment." *Slattery* v. *Rizzo*, 939 F.2d 213, 215 (1991).[13]

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equivocated. One Eighth Circuit case treats the issue as if it were unresolved. *Nelson* v. *County of Wright*, 162 F.3d 986, 990 n.5 (1998). And the Seventh Circuit, in *Frazell* v. *Flanigan*, 102 F.3d 877, 886-887 (1996), commented favorably on equating the qualified immunity and Fourth Amendment reasonableness inquiries. But see *Lanigan* v. *Village of East Hazel Crest*, 110 F.3d 467, 477 (7th Cir. 1997) ("We do not view *Frazell* as closing the door on" the possibility of permitting an officer to "claim the shield of qualified immunity" despite "his unreasonable use of force"). See also *McNair* v. *Coffey*, No. 00-1139, 2000 WL 1801253 (7th Cir. Dec. 8, 2000); pp. 36-38 & notes 17-18, *infra*.

[13] Ironically, the decision below—like others that attempt to equate the Fourth Amendment and qualified immunity inquiries—tends to dilute the substantive guarantees of the Fourth Amendment as much as it undermines qualified immunity. For example, the decision below at points suggests that the two inquiries are the same because, under the Fourth Amendment, conduct is "reasonable" if an officer reasonably could have believed it to be reasonable. See Pet. App. 10a (declaring that a seizure is reasonable under Fourth Amendment if "a reasonable officer *could have believed* that the force used was necessary under the circumstance[s]") (emphasis added). See also *Scott* v. *District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996) (equating the inquiries by holding that the Fourth Amendment is violated where "the excessiveness of the force is *so apparent* that *no reasonable officer* could have believed in the lawfulness of his actions") (emphases added; quotation marks omitted), cert. denied, 520 U.S. 1231 (1997). That attempt to equate the two inquiries, however, misstates and improperly dilutes the Fourth Amendment standard. An application of force violates the Fourth Amendment if the force is, on an objective basis, "unreasonable," as this Court's cases and constitutional text both attest. See U.S. Const. Amend. IV (guaranteeing the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); *Graham*, 490 U.S. at 396 (issue is whether "the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment"). The fact that a reasonable officer—based on pre-existing law—could have *believed* his conduct to be constitutionally reasonable does not automatically make that conduct reasonable for Fourth Amendment purposes. Indeed, equating the

B. The Ninth Circuit's Attempt To Reconcile Its Decision With This Court's Decisions Is Unpersuasive

Notwithstanding its reliance on the very reasoning this Court rejected as "unpersuasive" in *Anderson* v. *Creighton*, the court of appeals attempted to reconcile its decision with *Anderson* in a footnote. Pet. App. 14a n.4. Under Ninth Circuit precedent, the court of appeals pointed out, the qualified immunity inquiry must proceed in two steps. First, the court asks whether the "law"—by which the Ninth Circuit means the applicable legal rule, governing factors, verbal formula, or standard—"was clearly established" at the time the officer acted. *Id.* at 8a; *Headwaters Forest Def.* v. *County of Humboldt*, 211 F.3d 1121, 1141 (9th Cir. 2000) (declaring that, for purposes of the first prong, "the law concerning the use of excessive force is clearly established" even though its application in the particular factual context was "unprecedented," because "the law under *Graham* and its progeny concerning the relevant factors for assessing the limits on police use of force under the Fourth Amendment"

"unreasonable" force proscribed by the Fourth Amendment with force that no reasonable officer could consider reasonable renders the Fourth Amendment inquiry hopelessly circular. If taken seriously, such an approach would arrest the development of substantive Fourth Amendment law, labeling any seizure as "reasonable" whenever reasonable minds could disagree on the outcome under *Graham*. Nor does it matter that, under *Graham*, reasonableness determinations allow for reasonable factual mistakes, and must be made from the perspective of the officers on the scene, with due regard for the split-second nature of their decisions. Because of those requirements, there may be a range of "reasonable" options available to an officer in any given situation, and officers are not required to select the most reasonable or least forceful option. But it does not follow that a particular use of force is automatically "reasonable" within the meaning of the Fourth Amendment merely because an officer, based on the law existing at the time he acted, could reasonably have believed that to be the case. Instead, where an officer's choice is beyond the range of reasonable alternatives, his conduct violates the Fourth Amendment, even if he is entitled to immunity because his mistake was, in light of pre-existing law, justifiable.

are well established). See also Pet. App. 29a (district court's similar reasoning in this case). Second, the court conducts what it terms the "reasonable officer" inquiry, asking whether a reasonable officer could have believed the conduct to be lawful under the clearly articulated standard identified in the first prong. *Id.* at 8a.

Attempting to distinguish *Anderson* based on that two-pronged approach, the court of appeals declared that most of this "Court's qualified immunity discussion in *Anderson* focuses on the proper formulation of the 'clearly established'" step, or "the first prong" of that two-step analysis. Pet. App. 14a n.14. *Anderson*, the Court continued, does not "address the application of the second prong of the qualified immunity analysis," which is whether a reasonable officer could have believed his conduct to be lawful under the established standard. *Ibid.* In essence, the court of appeals seemed to reason, qualified immunity can be appropriate in excessive force cases, consistent with *Anderson*, only when there is uncertainty about the verbal formula or legal standard to be applied (the Ninth Circuit's prong one), but not where there is uncertainty about the outcome of applying a settled formula to the facts confronting the officer (the Ninth Circuit's prong two). See *id.* at 13a-14a (distinguishing earlier Ninth Circuit en banc decision according an officer immunity notwithstanding his use of unreasonable force as resting on a change in the governing Fourth Amendment standard). See also pp. 8-9, *supra*. Far from reconciling the decision below with *Anderson*, however, that purported distinction underscores the inconsistency.

1. As an initial matter, *Anderson* does not itself contemplate dividing the qualified immunity inquiry into two distinct "prongs," one involving whether there was "clearly established" law, and the other involving whether a reasonable officer could have believed his conduct to be lawful. Instead, *Anderson* makes it clear that the Ninth Circuit's second prong (whether a reasonable officer could have

thought the conduct lawful) provides the answer to the first (whether the law is "clearly established"). In *Anderson* itself, this Court explained that the law is "clearly established" in the sense relevant to the qualified immunity inquiry only if "[t]he contours of the right" are "sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." 483 U.S. at 640 (emphasis added). And in *Wilson* v. *Layne*, 526 U.S. at 614-615, this Court repeated that observation, declaring that "'[c]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Whether or not the general legal standard is clear, if reasonable officers could have disagreed on the conduct's lawfulness at the time the defendant acted, the law was not "clearly established" and immunity must be recognized. *Malley*, 475 U.S. at 341. Accordingly, *Anderson* cannot be distinguished as relating to "prong one" instead of "prong two" of the Ninth Circuit's two-prong immunity test because, under *Anderson*, the second "prong" of the Ninth Circuit's formulation (the reasonable officer test) is the means of answering the clearly established law inquiry. Whether or not the relevant legal formula or standard is well recognized, the law is *not* "clearly established" if officers could reasonably have believed that what *they were doing* would not violate the plaintiff's rights. See *Lennon*, 66 F.3d at 422 ("the defendants may nevertheless enjoy qualified immunity if it was objectively reasonable for them to believe that their actions did not violate those rights"); *Lanigan*, 110 F.3d at 472 (under the "analysis dictated by *Anderson* v. *Creighton*," court must "evaulat[e] the specific facts confronting an officer at the time of the challenged conduct").[14]

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[14] Contrary to the Ninth Circuit's supposition, it is not true that qualified immunity can be resolved solely by reference to the "first prong" of its test, *i.e.*, that a defendant "will always be entitled to qualified

2. In any event, the court of appeals was flatly incorrect to assert (Pet. App. 14a n.4) that *Anderson* v. *Creighton* addresses the Ninth Circuit's first prong (*i.e.*, whether the governing legal formula or standard was well settled), rather than the second prong (whether an officer could have thought his conduct lawful). In *Anderson*, there was no issue regarding the relevant legal formula (the Ninth Circuit's first prong) because the legal standard governing the conduct there—the warrantless search of a home—was well settled: Such warrantless searches, this Court explained, had long been held to be unlawful unless the officer has probable cause and exigent circumstances. See *Anderson*, 483 U.S. at 640.[15] Surely *Anderson* cannot be distinguished as a case involving uncertainty regarding the governing legal standard where *Anderson* itself characterizes the standard as longstanding and undisputed.

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immunity when" the legal test "governing his or her conduct * * * was not clearly established." Pet. App. 14a. In some cases, it may be sufficiently clear that certain conduct is unconstitutional even though the governing legal principle has not been reduced to a single articulation. Conversely, *Anderson* v. *Creighton* teaches that certainty regarding the legal test is not itself a sufficient basis for denying immunity. Instead, an officer is entitled to qualified immunity if a reasonably competent official, applying the governing legal test to the facts before him, could reasonably have believed that his conduct was lawful. See *Anderson*, 483 U.S. at 638 ("Our cases * * * generally provid[e] government officials performing discretionary functions with a qualified immunity as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.").

[15] See also *Steagald* v. *United States*, 451 U.S. 204, 211 (1981) (except for cases of "consent or exigent circumstances," the Court has "consistently held that entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant"); *Payton* v. *New York*, 445 U.S. 573, 578 (1980); *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1963) (Probable cause is "evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed.") (quoting *Carroll* v. *United States*, 267 U.S. 132, 162 (1925)).

To the contrary, *Anderson*'s core holding is predicated on the fact that the "legal rule" governing the officer's conduct in that case was well settled. The question *Anderson* decided was whether, given the clarity of the relevant legal standard, qualified immunity could still protect officers who might have reasonably erred in *applying* that established standard to the circumstances confronting them, *i.e.*, in determining that probable cause and exigent circumstances were present. 483 U.S. at 638-641.[16] The court of appeals in that case had refused to permit immunity in those circumstances, holding that the clarity of the general legal standard precluded qualified immunity. This Court reversed, holding that immunity protects officers even if the legal standard is clear, where it is not clear that every reasonable officer applying that legal standard to the facts of the case would understand the conduct to be unlawful. See *id.* at 640-641 (court of appeals erred by refusing to consider "the argument that it was not clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances"); 1 LaFave, *supra*, § 1.10(b), at 328 ("the question to be considered on remand * * * '[wa]s the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful'"). See also *Hunter*, 502 U.S. at 228 (officers entitled to immunity "if

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[16] Indeed, the question presented in *Anderson* was whether "the qualified immunity provided by *Harlow* [may be] overcome by a mere showing that the general legal rule was well established, or must the court further determine that the official could not have reasonably believed that his own conduct was lawful in light of the facts and circumstances as they reasonably appeared to him." Gov't Br. at i, *Anderson* v. *Creighton* (No. 85-1520). That, moreover, was the question the parties briefed, see, *e.g.*, *id.* at 13-30; Resp. Br. at 19-30, *Anderson* v. *Creighton* (No. 85-1520). And it was the question presented as the dissenting opinion understood it as well, *Anderson*, 483 U.S. at 657 (Stevens, J., dissenting) (arguing that, before discovery takes place, "the *Harlow* requirement concerning the clearly established law applies to *the rule on which the plaintiff relies*").

a reasonable officer could have believed" probable cause existed). As this Court explained, the relevant question for qualified immunity is "whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." 483 U.S. at 641. That *is* what the Ninth Circuit considers to be the second prong—the reasonable officer test—expressed in nearly identical language. See Pet. App. 8a (under second prong, court asks whether "a reasonable official could have believed the conduct was lawful").

3. Stripped of the prong-one and prong-two labels, the Ninth Circuit's rationale rests on the assumption that, because the legal standard or test applicable in excessive force cases was settled by this Court's decision in *Graham*, officers cannot be entitled to qualified immunity if they violate constitutional norms. See Pet. App. 13a-14a. Stating that position more directly, another court of appeals has opined that "[u]ncertainty about the legal standard" applicable to excessive force cases "ended * * * with [this Court's] opinion in *Graham*"; while "[t]here may still be uncertainty in the application of that standard to particular situations," that court continued, "this is not the kind of legal uncertainty that *Anderson* and *Wilson* discuss." *McNair* v. *Coffey*, No. 00-1139, 2000 WL 1801253, at *2 (7th Cir. Dec. 8, 2000).

As the foregoing discussion (pp. 16-21, 34-35 & note 16, *supra*) explains, that characterization of *Anderson* is exactly backwards: "[U]ncertainty in the application of" well-settled legal standards "to particular situations" is *precisely* "the kind of legal uncertainty that" *Anderson* addressed. In *Anderson* itself, this Court specifically held that, even though the legal standards governing the search—the requirement of probable cause and exigent circumstances—were well established, the officer was entitled to qualified immunity unless it should have been obvious to him that probable

cause and exigent circumstances were absent on the facts before him. 483 U.S. at 640-641.[17] By the same token, even though the standard of "objective reasonableness" and the non-exclusive list of relevant factors from *Graham* are well established here, Specialist Saucier is entitled to qualified immunity unless it should have been obvious to him that, under the facts before him and in light of pre-existing law, the force he employed was objectively unreasonable within

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[17] Any attempt to limit qualified immunity to cases in which the abstract legal rule or test—as opposed to the result of applying it—is unsettled, moreover, would effectively convert the qualified immunity defense into a pleading rule, a result that *Anderson* specifically sought to avoid. As this Court observed, such an approach would permit plaintiffs to defeat immunity by characterizing their rights very generally, *e.g.*, by arguing that the right to due process is clearly established, and by arguing that the defendant is merely disputing an application of the general rule to the specific facts of the case. 483 U.S. at 639-640. Because rules of law "[i]n constitutional adjudication, as in the common law, * * * often develop incrementally as earlier decisions are applied to new factual situations," *Williams* v. *Taylor*, 120 S. Ct. at 1508 (opinion of Stevens, J.), the line between a new rule or principle and a mere application of an existing principle is a slippery one, and potentially subject to manipulation. See *Anderson*, 483 U.S. at 640 n.2. In fact, the court of appeals' decision in *McNair*, *supra*, appears to engage in precisely such a shell game. In that case, the defendant argued that his conduct—he displayed force by pointing a gun at the plaintiffs—did not violate the plaintiffs' clearly established Fourth Amendment rights. The court of appeals suggested that it would have considered that argument for immunity purposes if the defendant had characterized the issue as purely legal, arguing that it was not clearly established that a *display* of force causing fright, as opposed to the *application* of force through physical contact, can constitute an excessive use of force under the Fourth Amendment. *McNair*, 2000 WL 1801253, at *1, *3. But it declined to entertain the argument because the defendant had characterized his contention differently, taking the abstract legal rules "as settled," and arguing only that, under those rules, it was not clearly established that *his conduct* would violate the plaintiff's rights. *Ibid.* As *Anderson* makes clear, the availability of immunity should not turn on how immunity is pleaded any more than it should depend on how the constitutional violation is characterized. Instead, an officer is entitled to immunity unless the contours of the plaintiff's rights are sufficiently clear that a reasonable officer would understand that his actual conduct—"what he is doing"—violates the plaintiff's rights.

the meaning of the Fourth Amendment. See *Anderson*, 483 U.S. at 640 (immunity may be denied only if "a reasonable official would understand that *what he is doing* violates that right," *i.e.*, "the unlawfulness must be *apparent*.") (emphases added); *id.* at 638 ("Our cases * * * generally provid[e] government officials * * * with a qualified immunity as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated").[18]

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[18] In *McNair*, the court of appeals asserted a few other reasons for restricting the scope of the qualified immunity defense in Fourth Amendment cases, but none is consistent with *Anderson*, and none is persuasive. First, the *McNair* court suggested that allowing the defense of immunity in this context—asking "whether a reasonable person would have realized that his conduct violates established legal standards—[would] reintroduce[] the element of subjectivity that *Graham* deliberately removed." *McNair*, 2000 WL 1801253, at *3. This Court rejected that argument in *Anderson*. "[C]ontrary to the Creightons' assertion," this Court stated, application of the no-reasonable-officer test "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent * * *. [T]he relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant." 483 U.S. at 641. Second, the *McNair* court suggested that qualified immunity is an extra-statutory "judicial invention" that should be narrowly construed. 2000 WL 1801253, at *4. That rationale is doubly flawed. For one thing, it cannot support expanded liability in cases like this one or *Anderson*, since the *Bivens* cause of action itself was judicially crafted. For another, even in the context of actions under 42 U.S.C. 1983, the Court did not "invent" the qualified immunity defense in the sense in which *McNair* uses that term; instead, the Court recognized the defense as a matter of statutory construction. See *Wood*, 420 U.S. at 316-317 (immunity a matter of "statutory construction" because Section 1983 evidenced no intent to abolish long-standing immunity doctrines). Third, *McNair* suggests that, as a historical matter, the police faced "absolute liability" for any invasion of the rights protected by the Fourth Amendment. 2000 WL 1801253, at *4. But this Court has repeatedly applied qualified immunity in Fourth Amendment cases such as *Anderson* and *Malley*, and in any event expressly rejected the common law rule of strict liability in *Anderson*. There, the plaintiffs claimed that immunity should "not be provided to police officers who conduct unlawful warrantless searches" because "officers conducting

C. The Ninth Circuit's Decision Undermines The Ability Of Courts To Dispose Of Suits Before Trial Under Qualified Immunity

Because qualified immunity is "an *immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526, one of its central "purposes * * * is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a drawn out lawsuit," *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). Consequently, this Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation," so that officers do not "err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 227, 229 (internal quotation marks omitted).

The Ninth Circuit's approach to qualified immunity—by equating qualified immunity with the ultimate constitutional issue—is inconsistent with that purpose. Under that court's analysis, the reasonableness of any use of force is usually "a question of fact" for the jury; as a result, qualified immunity must be denied unless "the evidence *compels* the conclusion that [the officer's] use of force was reasonable." Pet. App. 15a n.5 (emphasis added).[19] This Court, however, has

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such searches were," at common law, "strictly liable." 483 U.S. at 644. This Court concluded otherwise, explaining that it had "never suggested that the precise contours of official immunity can and should be slavishly derived by the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law * * *." *Id.* at 645. Indeed, the Court continued, "*Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" *Ibid.* Nowhere does the decision below or *McNair* explain why excessive force cases should be excepted from *Harlow*'s otherwise "across the board" application.

[19] The Fourth Amendment reasonableness determination, on any particular set of historical facts, is more properly characterized as a mixed question of law and fact. See *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996). In *Ornelas*, this Court held that similar Fourth Amendment mixed fact-law questions, such as whether an officer had reasonable suspicion or

already reversed the Ninth Circuit for adopting a virtually indistinguishable standard in the probable cause context. In *Hunter* v. *Bryant*, the Ninth Circuit held that "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment * * * based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." 502 U.S. at 228. This Court rejected that formulation because "it routinely places the question of immunity in the hands of the jury." *Ibid.* The Ninth Circuit's formulation of the qualified immunity test here should be rejected for the same reason.

The Ninth Circuit's approach, moreover, turns the immunity inquiry on its head. Summary judgment on qualified immunity in an excessive force case should not be *limited* to cases where the force was so clearly reasonable as to "compel[]" the conclusion that it was lawful. Pet. App. 15a n.5. Quite the opposite: Summary judgment on qualified immunity is *required* if, viewing the facts in the light most favorable to (and resolving all factual disputes in favor of) the plaintiff, a reasonably competent officer could have believed that the force was reasonable. *Malley*, 475 U.S. at 341 (immunity may be denied only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct was constitutional). In other

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probable cause on the facts before him, are subject to de novo review. See *id.* at 697. See also *United States* v. *Rios*, 88 F.3d 867, 869 (10th Cir. 1996) (Fourth Amendment reasonableness, on a given set of historical facts, is an "ultimate question of law" subject to de novo review); *United States* v. *Mills*, 122 F.3d 346, 348 (7th Cir.) ("[T]he rationale of *Ornelas* cannot be limited, in a principled manner," to the Fourth Amendment issues of reasonable suspicion and probable cause.), cert. denied, 522 U.S. 1033 (1997). This Court has held that the issue of qualified immunity—whether the officer's conduct was proscribed by clearly established law—is a legal issue subject to de novo review. See *Elder* v. *Holloway*, 510 U.S. 510, 516 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity, presents a question of law" that "must be resolved *de novo* on appeal.").

words, in deciding qualified immunity, courts must resolve all disputes regarding historical facts—*i.e.*, what actually happened—in favor of the plaintiff, and draw all inferences in the plaintiff's favor. But having identified the most plaintiff-favorable fact pattern supported by the evidence, the court must grant the officer immunity unless, under those facts and pre-existing law, *no* appropriately competent officer could reasonably have believed that the force was lawful. Thus, if there were a fact dispute concerning whether or not an officer gratuitously struck a compliant suspect with a truncheon, qualified immunity would be inappropriate, and obviously so; any belief that the Fourth Amendment permits such undue violence would be patently unreasonable. But where the facts at most raise a reasonable question regarding the lawfulness of the officer's conduct, immunity must be recognized.

For that reason, qualified immunity serves an "important purpose" in helping terminate insubstantial claims at the summary judgment stage. See *Ellis* v. *Wynalda*, 999 F.2d 243, 246 n.2 (7th Cir. 1993). It does not excuse the court from viewing the evidence in the light most favorable to the nonmoving party. But once the facts are so viewed, it permits the entry of judgment not merely where every rational decisionmaker would think the force lawful, but also where "reasonable minds could differ." *Ibid.* As one court of appeals explained, qualified immunity must be granted unless the relevant standards or cases "truly compel (not just suggest or allow or raise a question about), the conclusion * * * that what defendant [allegedly did] violates federal law in the circumstances." *Priester*, 208 F.3d at 927. See also *Hunter*, 502 U.S. at 227 ("qualified immunity shields agents * * * if 'a reasonable officer could have believed'" the conduct "to be lawful"). Because the Ninth Circuit's test inverts that analysis—and precludes summary judgment unless every reasonable officer (and every reasonable judge or juror) would agree that the force was proper—it impermissi-

bly prevents qualified immunity from serving as an immunity to suit, and reduces it to a mere defense to liability.

II. THE COURT OF APPEALS ERRED IN DENYING QUALIFIED IMMUNITY IN THIS CASE

This case illustrates the danger of equating the Fourth Amendment and qualified immunity inquiries. As the district court noted, Specialist Saucier asserted qualified immunity for (1) the "degree of force used to remove [respondent] from the crowd," and (2) the force used to "place [respondent] inside the van." Pet. App. 29a. See also *id.* at 27a (analyzing the two uses of force). The court of appeals in this case held that Specialist Saucier was not entitled to qualified immunity for those uses of force "because the amount of force he used" was not "so minimal that it was *per se* reasonable." Pet. App. 14a-15a. Whatever one might think of the constitutionality of the force Specialist Saucier used in the circumstances that confronted him, that force was not so clearly unlawful under prior law that Saucier could not have reasonably thought it lawful. To the contrary, the Ninth Circuit's conclusion that the force used was unreasonable comes perilously close to establishing a new—and unjustified—rule that officers may not use any physical force to restrain detainees when effectuating a seizure in contexts like this one.

A. Specialist Saucier's Use Of Force To Detain Respondent Did Not Violate Clearly Established Constitutional Rights

The first use of force challenged by respondent is the force Specialist Saucier, together with Sergeant Parker, employed to remove respondent from the crowd at the Presidio. It is not disputed that, as respondent unfolded his banner near the platform where the Vice President was speaking, Saucier and Parker each took one of respondent's arms, lifted him partially off the ground, and rushed him out of the crowd to a waiting military van. See Pet. App. 4a, 24a-25a; *id.* at

27a (describing videotape); pp. 3-4, *supra*. The Ninth Circuit denied Saucier's claim that he was entitled to immunity for that conduct, concluding that "no reasonable officer could have believed that" grasping respondent's arm "without warning or speaking to" him, and partially carrying respondent from the crowd, "was necessary under the circumstances," *id.* at 15a, because respondent's crime was not serious and respondent did not pose an immediate threat to public safety. The court stated:

> Unfurling a banner at a public event does not appear to be a particularly severe crime. Katz was sixty years old and wearing a leg brace. There is no indication he was armed or dangerous. From all that appears at this stage of the case, he did not pose an immediate threat to the safety of the officers or anyone else.

Ibid.

By holding that the use of such minimal force is not only unreasonable, but *so obviously* unreasonable that no officer could have thought it lawful, the Ninth Circuit has effectively held that, in cases like this, officers are prohibited from using *any force at all* to make an arrest. That suggestion is difficult to reconcile with this Court's decision in *Graham*, which recognizes "that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." 490 U.S. at 396. It is contrary to the decisions of other courts of appeals, which uphold as reasonable applications of force that are significantly more intrusive where, as here, no injury results.[20] And it appears to contravene the

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[20] See, *e.g.*, *Curd* v. *City Court of Judsonia*, 141 F.3d 839, 841 (8th Cir.) (where officer "seized [arrestee's] arm, spun her around and told her to get into the police car," the "limited amount of force" was not "objectively unreasonable" under *Graham*, "[e]ven if * * * unnecessary to effect the arrest," especially given that the plaintiff "does not allege, and there is no evidence, that she was injured or experienced physical pain"), cert. denied, 525 U.S. 888 (1998); *Hinton* v. *City of Elwood*, 997 F.2d 774, 781 (10th Cir.

policies of numerous law enforcement agencies, which require officers to apply some physical restraint, such as handcuffs, when arresting individuals to ensure that those individuals do not pose a danger to the officers or themselves.[21]

The Ninth Circuit's ruling, moreover, blinks reality. The officers in this case, charged with ensuring the safety of the Vice President, who was standing steps away, had a split second to react to respondent's movement toward and at the barrier that separated the crowd from the Vice President.

1993) (officers did not violate constitutional norms where they grabbed plaintiff from behind, announcing he was under arrest, and used increased force when he resisted); *Williams* v. *Bramer*, 180 F.3d 699, 703-704 (5th Cir. 1999) (declining to find Fourth Amendment violation absent injury where force was, in context, relatively minimal). Indeed, the Eleventh Circuit has, in a long line of qualified immunity cases, repeatedly applied the "de minimis" label to uses of force that exceed the amount used in this case. *Nolin* v. *Isbell*, 207 F.3d 1253, 1255-1258 (2000) (summarizing). See, *e.g.*, *Jones* v. *City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997) (immunity proper where officer "slammed" the plaintiff against a wall and "kicked his legs apart," causing him to suffer pain).

[21] See, *e.g.*, Federal Bureau of Investigation, *Manual of Investigative Operations and Guidelines*, Pt. II, § 11-1.5 (effective May 26, 1989) ("[I]t is required that all arrested persons be handcuffed."); International Ass'n of Chiefs of Police/National Law Enforcement Policy Center, *Model Policy on Transportation of Prisoners* (Oct. 1, 1997) ("Officers shall handcuff (double-locked) all prisoners."). For that reason, in *Limbert* v. *Twin Falls County*, 955 P.2d 1123 (1998), the Idaho Supreme Court rejected a constitutional challenge to a Sheriff Department policy of handcuffing all arrested individuals, even if they appear to be "non-threatening," and even as applied to a woman who suffered from asthma and cystic fibrosis. "Even the most meek-appearing and fragile suspect," the court explained, "may have the ability to place the officer, the public, and the suspect at great risk." 955 P.2d at 1127. In this case, both Specialist Saucier and Sergeant Parker were keenly aware of that fact. See J.A. 41 ("Any person can be a physical threat.") (Saucier Dep.); J.A. 53 (respondent "could have been a danger to a lot of different people" if he were "loose" with "a weapon") (Parker Dep.). There may be special situations in which the reasonable amount of force is limited to the application of handcuffs or similar restraints. This case, however, does not present that issue. The minimal amount of force the officers employed to obtain control over and remove respondent from the crowd was not unreasonable, and surely was not so unreasonable that no competent officer could have thought it lawful.

They were confronted with an individual who was openly flouting the law; they faced the possibility of escalation, in view of the presence of other potential protestors in the large crowd; and they could not know for certain how respondent himself might react to them. Accordingly, they used surprise to their advantage by quickly seizing respondent and whisking him away. The court of appeals concluded that such a strategy was unreasonable because, in its view, the officers should have "warn[ed] or sp[oken] to" respondent first. Pet. App. 15a. In hindsight, speaking to respondent before seizing him may have been a reasonable alternative. But it also could have produced resistance, flight, escalation, or a commotion.[22] We know of no decision of this Court holding that the police, confronted with a suspect who openly defies the law, must discuss the possibility of seizure with him in advance, and may not use surprise to take him into custody quickly and with minimal disturbance. Moreover, even if the Fourth Amendment and *Graham* could be construed as imposing such a requirement, Specialist Saucier is entitled to qualified immunity, since he could not be said to have been "plainly incompetent" or "knowingly violating the law" for failing to anticipate and conform his conduct to it under the circumstances he confronted. *Malley*, 475 U.S. at 341.

The court of appeals, moreover, fundamentally erred by employing hindsight to second-guess the perceptions and actions of the officers on the scene. Fourth Amendment and qualified immunity issues, this Court has admonished, must be examined from "the perspective of a reasonable officer on the scene," *Graham*, 490 U.S. at 396, and should not be reconstructed in view of the more expansive knowledge that

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[22] See J.A. 44 (Saucier Dep.) (goal was to avoid "draw[ing] that much attention" if the officers "didn't have to"; officers wanted to "diffuse the situation" by getting respondent "into the van as quickly as possible"); J.A. 67 (Lee Dep.) (officers "were supposed to diffuse the situation," if necessary by "removing that person as quickly as possible").

extensive litigation and leisurely examination can produce years later, see *Hunter*, 502 U.S. at 228 ("the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact"). In this case, the court of appeals repeatedly ignored those admonitions. First, without acknowledging the atmosphere of uncertainty confronting the officers, the court of appeals faulted their treatment of respondent because, "at this stage of the case," it "appears" that respondent posed no "immediate threat." Pet. App. 15a. See also *ibid.* (relying on the fact that "[t]here *is* no indication" that respondent was armed or dangerous) (emphasis added). The relevant question, however, is not what "appears" now, after years of litigation; the question instead is what the officers knew at the time. *Hunter*, 502 U.S. at 228. As explained above, in the split second Saucier and Parker had, they could not predict how respondent would react to being detained; nor could they know what he might have had concealed in his clothing. J.A. 50, 53, 59 (Parker Dep.); pp. 44-45 & note 21, *supra*. Moreover, the fact that an officer does not have reason to believe that a suspect is armed merely precludes him from using *deadly* force. See *Garner*, 471 U.S. at 11. The absence of such suspicion, however, has never been held to preclude an officer from using a modicum of force to seize a suspect like respondent who, in the officer's presence, is flagrantly and knowingly violating the law. For the same reasons, the court of appeals erred in attributing significance to the fact that respondent was wearing a leg brace. Pet. App. 15a, 27a. There was no evidence that either officer was aware of the brace, and respondent himself testified that the brace was *underneath* the leg of his trousers. J.A. 21 (Resp. Dep.); J.A. 52 (Parker Dep.); J.A. 38-39 (Saucier Dep.). Finally, although respondent denies resisting arrest, his undisputed conduct—he anchored himself to the barrier that separated

him from the Vice President as the officers attempted to gain control over him—surely justified the belief that some force could be used to remove him.[23]

Given the above considerations, there is substantial reason to question the Ninth Circuit's legal conclusion that, viewing the facts most favorably to respondent, Specialist Saucier employed objectively unreasonable force to apprehend respondent. In our view, under the circumstances of this case, the conclusion that Saucier violated the Fourth Amendment by using minimal force to remove respondent from the crowd—force that produced no physical injury—is all but foreclosed as a matter of law. See pp. 43-45 & notes 20-21, *supra*. But in this case and in others there may be differences of opinion about the ultimate constitutional question, and it is precisely such cases that underscore the importance of distinguishing the test for qualified immunity from the test for finding a constitutional violation. If the court of appeals had addressed the two questions separately, it would have stopped for a moment after finding the constitutional violation and asked a critical question—whether its conclusion that the force was unconstitutional was so obvious in advance that reasonable officers (or reasonable judges) could not have disagreed. Whatever one might say of the Ninth Circuit's conclusion that Specialist Saucier's use

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[23] Respondent testified that, as the officers took hold of him, he held his banner in place on the barrier that separated him from the Vice President, attempting to prevent its removal; that action necessarily held him in place as well. See J.A. 23 ("I just held it in place while I think they had their arms around me"); J.A. 24 ("Q. Did you try to prevent the banner from being taken away from the railing, taken off the railing? A. * * * I think I did, but it got pulled away real quick."). As a result, both officers testified that respondent attached himself to the barrier, necessitating his removal. See J.A. 38 (Saucier Dep.) ("He tried to keep himself anchored at the front of the seating area."); J.A. 51 (Parker Dep.) ("[H]e took his hands and put them on the barricade. And I was trying to pull him off the barricade."); J.A. 53 (Parker Dep.) ("[A]s I went up to the barricade * * * and I put my arms around him * * * he clenched onto the bars").

of minimal force to apprehend respondent was unreasonable, the use of that force was not sufficiently beyond the bounds of potentially lawful conduct that "no reasonably competent officer would have concluded" it to be lawful. *Malley*, 475 U.S. at 341. To the contrary, because it is far from obvious that Saucier's conduct was unlawful at all, much less clearly unlawful in light of pre-existing law, he is entitled to qualified immunity under *Anderson*, 483 U.S. at 640.

B. Saucier's Placement Of Respondent Into The Van Did Not Violate Respondent's Clearly Established Rights

Alternatively, the Ninth Circuit seems to have concluded that the force used to place respondent in the van was constitutionally unreasonable. In particular, the court noted that respondent had denied resisting and therefore concluded that it may not have been necessary to push respondent inside. Pet. App. 15a. Once again, however, the court of appeals erred by examining the facts as we know them today, rather than examining the facts as they were perceived by the officers at the time—including undisputed evidence of conduct that reasonably led the officers to conclude that respondent was resisting being placed in the van.[24]

Even if we set aside that error, Specialist Saucier is entitled to qualified immunity. As this Court has held, "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' *Johnson* v. *Glick*, 481 F.2d [1028, 1034 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)], violates the Fourth Amendment." *Graham*, 490 U.S. at 396. *A fortiori*, the single push at issue here, even if later deemed unnecessary, cannot be so clearly unconstitutional as

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[24] It is not disputed that respondent took actions that could have created the appearance of resistance: Specialist Saucier testified that respondent resisted by putting his feet on the van's bumper and pushing away, J.A. 39-40 (Saucier Dep.), while respondent testified that he put his feet on the van's entry or the bumper as the officers attempted to place him inside, J.A. 26 (Resp. Dep.).

to defeat qualified immunity. Nor does it matter that respondent, in his complaint, alleged that he was shoved "violently" or that he was "almost" injured. See Pet. App. 15a. Respondent was not injured, and merely quoting the adverb "violently" from the complaint cannot substitute for reasoned analysis of whether the evidence shows force that was so clearly excessive as to render qualified immunity inappropriate. See Fed. R. Civ. P. 56(e) (party may not "rest upon the mere allegations" of a pleading to defeat a properly supported motion for summary judgment).[25] Here, after reviewing a videotape of the actual events in question, the district court declared that, when viewed "in a light most favorable to" respondent, the tape showed the officers "removing" respondent from the crowd, "carrying or pulling him" toward the van, and "push[ing]" or "placing" him inside. Pet. App. 27a. The videotape itself, copies of which have been lodged with the Court, confirms that analysis, and dispels the notion that the allegedly "violent" shove of which respondent complains was so excessive as to be clearly and obviously unlawful. It may have been forceful, and it may have departed from model police conduct. But not every departure from model conduct violates the Constitution and, under the circumstances, there was good reason to believe that such force was necessary. See note 24, *supra*. In any event, the push certainly did not extend "so far beyond" the sometimes "hazy border between excessive and acceptable force that," under the circumstances, an officer would have

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[25] The characterization of the push as "violent[]," even if accepted, does not itself establish that qualified immunity should have been denied. Black's defines "violently" as "[b]y the use of force; forcibly," *Black's Law Dictionary* 1570 (6th ed. 1990), and "violent" as "characterized" by "physical force, especially by extreme and sudden or by unjust or improper force." *Ibid.* Consequently, the inclusion of the word "violently" in the complaint merely underscores the fact that the push involved force, and potentially "unjust and improper" force. It does not demonstrate that the force used was so extreme and unjustified that no reasonable officer could have thought it lawful.

"to know he was violating the Constitution." *Priester*, 208 F.3d at 926. See *Harlow*, 457 U.S. at 818 (officer entitled to immunity unless reasonably competent official would "fairly be said to 'know' that the law forbade [the] conduct"). See pp. 43-44 & notes 20-21, *supra*.

In any event, it is hard to see how the supposedly violent push of which respondent complains is relevant to *Specialist Saucier's* claim of immunity. It is undisputed that the allegedly forceful push did *not* come from Saucier. Instead, as the videotape and the depositions attest—and as respondent does not deny—that push came from Sergeant Parker.[26] Nowhere did the Ninth Circuit offer any reason for holding Specialist Saucier, the only petitioner in this case, liable for Parker's conduct. Consequently, viewing the evidence in the light most favorable to respondent, the only question here is whether Saucier's conduct of placing respondent into the van from the left hand side—not Parker's allegedly violent push from the right—violated respondent's Fourth Amendment rights. It did not, and a reasonable officer in Saucier's position surely could have believed that to be the case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[26] The videotape shows the allegedly violent push coming from the officer on the right hand side, as respondent is placed into the van. It is not disputed that Sergeant Parker appears on the right side of the screen, and that Specialist Saucier appears on the left, wearing glasses. See J.A. 42-43 (Saucier Dep.); J.A. 56, 58 (Parker Dep.). We pointed that out in our petition for a writ of certiorari (at 27-28 & n.19), and respondent—although identifying other facts allegedly in need of clarification in his brief regarding certiorari—did not contend otherwise.

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